No. 12703.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNION PACKING COMPANY,

Appellant and Defendant,

vs.

CARIBOO LAND & CATTLE CO., LTD.,

Appellee and Plaintiff.

BRIEF OF APPELLEE CARIBOO LAND & CATTLE CO., LTD.

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Statement of Facts.

Plaintiff, Appellee, is an American owned and officered corporation operating extensive cattle ranches in West Central British Columbia, Canada. Defendant, Appellant, is a California corporation engaged at Los Angeles, California, in the slaughtering and meat-packing business.

In May or June, 1948, a preliminary meeting was had between plaintiff's President, Mr. John Wade, and defendant's President and General Manager, Mr. Adolph Miller, at which the possibilities of the latter's Company purchasing cattle from plaintiff were explored. Mr. Miller stated that defendant would be interested in purchasing plaintiff's cattle and the matter was left for further discussion.

On September 8, 1948, they again conferred and Mr. Miller offered to purchase approximately 250 head of plaintiff's cattle, delivered to his company at Los Angeles, and offered pay therefor 46¢ per lb. of beef dressed there-

from, plus 2¢ a lb. for the cattle's offal. Thereafter, on September 10, 1948, Mr. Wade advised Mr. Miller that he wished to confirm Mr. Miller's offer of September 8th, as he desired to make arrangements for the shipment. Whereupon, Mr. Miller restated the terms of his previous offer.

Mr. Wade then communicated with the ranch and the cattle were brought to the railroad shipping point at Williams Lake, British Columbia. On arrival on a date placed between September 24 and September 28, 1948, Mr. Ray Swanson, then an officer of plaintiff corporation, telephoned from Williams Lake to Mr. Miller in Los Angeles, concerning the shipment, and Mr. Miller instructed Mr. Swanson to ship the cattle to defendant at Los Angeles, stating he had a deal concerning approximately 250 head. As Mr. Swanson was somewhat hard of hearing, Mr. Ben Jaffe, Vice President of plaintiff corporation, entered the phone booth with Mr. Swanson and overheard the conversation.

Following this conversation between Messrs. Swanson and Miller, and on the evening of the day thereof, plaintiff loaded the cattle at Williams Lake upon railroad cars and the shipment to defendant at Los Angeles, via Vancouver, British Columbia, was commenced.

The cattle were unloaded at Vancouver for water and feed and when ready to be reloaded, Mr. Swanson on September 28th, telegraphed Mr. Miller that ten carloads of cattle were leaving Vancouver. The cattle were thereupon shipped from Vancouver, consigned to defendant at

Los Angeles and arrived in Los Angeles on October 6, 1948.

It is uncontradicted that when the offer was made and reaffirmed that defendant had a contract to supply the United States Government with 200,000 pounds of dressed beef and that the Government cancelled this contract thereafter and while the cattle were in transit. It is also uncontradicted that the market price of dressed beef dropped appreciably from the period of September 8 and September 10, and the time the cattle arrived in Los Angeles.

Following the transmission of the said telegram of September 28 to Mr. Miller, Mr. Swanson came to Los Angeles and saw Mr. Miller a few days before the arrival of the cattle. At that time, Mr. Miller on behalf of defendant buyer, disavowed any arrangements with plaintiff and arranged with the Southern Pacific Company as carrier to divert the cattle from defendant's yards, as consigned, to Union Stockyards at Los Angeles (the Union Stockyards have no connection with the Union Packing Co.), and arranged for the cattle to be offered on the open market to cattle purchasers. The highest offer made for the cattle was 21¢ a pound live weight. Defendant then took the cattle, paying 21½¢ per pound live weight therefor. This sum amounted to $1348.10 over the price otherwise offered.

The Regulations of the United States Department of Agriculture required, inasmuch as these cattle were coming from a foreign country, that they be slaughtered within 14 days after entering this country. The cattle

entered the United States on September 29th, and arrived in Los Angeles on October 6th, and were unloaded October 7th. Accordingly, there were only a very few days within which the cattle had to be slaughtered under the risk of the penalties imposed by the Regulations.

The present action is for the difference between the contract price of the cattle and the sum which plaintiff received on account. The court below gave plaintiff judgment for that sum and defendant appeals.

The defense urged at the trial and again upon this appeal is (1) that there was no agreement between plaintiff and defendant and (2) that if there was such an agreement, it being admittedly oral, it is invalid under the Statute of Frauds in the State of California. The trial court concluded from the evidence that there was an agreement between the parties inasmuch as the defendant had made a continuing offer to purchase approximately 250 head of cattle delivered in Los Angeles for a stated price and that the plaintiff had accepted such offer by delivering 248 head. The court further concluded that the words and conduct of the President and General Manager of defendant corporation following the offer, were such as to estop the defendant from asserting the Statute of Frauds as a defense to the action.

The basis upon which the trial court had jurisdiction is, as alleged in paragraphs I and II of the Complaint [Tr. 2], diversity of citizenship and that the amount in controversy exceeds the sum of $3,000 (28 U. S. C. A. Sec. 1332, A-1).

BRIEF OF THE ARGUMENT.

I.

Findings of Fact Will Not Be Disturbed on Appeal if There Is Sufficient Evidence to Support Them.

In considering the case on appeal, this court must accept the evidence supporting the judgment if substantial and will not disturb the Findings of Fact if supported by sufficient evidence.

II.

The Evidence Establishes That a Valid and Binding Contract for the Sale and Purchase of the Cattle Was Entered Into Between the Parties.

A. Defendant's offer was preceded by a preliminary conversation regarding its purchase of cattle.

B. Defendants made a continuing offer to purchase approximately 250 head of cattle upon specific terms.

C. Thereafter, defendant's President reaffirmed such offer.

D. Plaintiff accepted defendant's offer by shipping to it at Los Angeles 248 head of cattle.

E. The inactivity of defendant's President, upon receiving a telegram advising him that the cattle were being sent, is evidence of the agreement.

F. Under the established custom of the business, the consigning of the cattle by the plaintiff to the defendant is evidence of the agreement.

G. The actions of defendant's President upon the arrival of the cattle in Los Angeles in causing them to be diverted from defendant's yards, in arranging for them to be sold by a commission merchant, and in paying considerably more than the highest bid, is evidence of the existence of the agreement between the parties.

H. The defendant's records of the slaughter of these cattle in revealing that such records were kept in a different manner than were its records generally, is evidence of the agreement.

I. There were no actions of the plaintiff at any time which were inconsistent with the existence of an agreement.

III.

The Terms of the Agreement Were Definite and Certain and Were Fully Performed by Plaintiff.

A. The agreement was definite and certain as to subject matter, covering as it did approximately 250 head of killable fat cattle. Plaintiff delivered 248 head of killable fat cattle to defendant.

B. The price to be paid for the cattle was definite and certain and was a minimum of 46 cents per pound of beef dressed therefrom, plus 2 cents per pound for the offal yielded therefrom.

C. The time for the delivery of the cattle in Los Angeles was agreed to as being prior to October 10, 1948. The plaintiff delivered the cattle at Los Angeles on October 6, 1948.

IV.

Defendant Repudiated the Contract Because of the Admitted Drop in the Market for Dressed Beef and Because of the Cancellation by the Government of Substantial Contracts for the Purchase of Dressed Beef.

A. It is undisputed that the market price of dressed beef dropped between the time defendant made the offer, and subsequently confirmed it, and the time the cattle arrived in Los Angeles.

B. It is undisputed that between the time plaintiff made the offer and subsequently confirmed it and the time when the cattle arrived in Los Angeles, the United States Government cancelled its contracts with the defendant to purchase dressed beef in the approximate quantity of beef dressed from the cattle in question.

V.

Defendant, by the Words and Conduct of Its President and General Manager, Is Estopped to Assert the Statute of Frauds.

Under the decisions of this court, the trial court is given discretion in determining the application of the doctrine of equitable estoppel and this court will not interfere with such findings in the absence of an abuse of discretion.

A. Subsequent to defendant making the offer to purchase, and prior to plaintiff shipping the cattle, defendant acknowledged the agreement and directed plaintiff to ship the cattle and is thereby estopped to assert the Statute of Frauds.

B. Defendant having induced plaintiff to expend in excess of $10,000 for transportation and United States

Custom duties in the performance of the agreement, is estopped to assert the Statute of Frauds.

C. Defendant, not having withdrawn his offer when he received a telegram before the shipment was made advising him that the shipment was being made, is estopped to assert the Statute of Frauds.

D. Defendant induced plaintiff to ship the cattle into the United States knowing that it was required under the regulations of the United States Department of Agriculture to slaughter them within four days after they were unloaded and thus having deprived plaintiff of a suitable market for its cattle, is estopped to assert the Statute of Frauds.

E. The cases of this Court cited by defendant all recognize the doctrine of equitable estoppel.

VI.

The Findings of Fact Support the Judgment.

The Findings of Fact that defendant made and later confirmed a continuing offer to purchase cattle from plaintiff to be delivered to defendant at its meat packing plant in Los Angeles, that this offer was accepted by plaintiff by so delivering the cattle, and that the words and conduct of defendant's principal officer estop defendant from asserting the Statute of Frauds support the judgment.

The judgment as to the amount of recovery is supported by the Findings of Fact and the Court properly applied the law as to the amount of recovery.

ARGUMENT.

I.

Findings of Fact Will Not Be Disturbed on Appeal When There Is Sufficient Evidence to Support Them.

The basis of this appeal as seen from Appellant's Opening Brief is that the evidence is insufficient to support the Findings of Fact that the parties entered into an oral agreement and that defendant is equitably estopped by the words and conduct of its principal officer from asserting the Statute of Frauds. No rule of Federal appeals is more firmly established than that Findings will not be disturbed if supported by sufficient evidence. The Appellate Court limits its inquiry to whether or not there is substantial evidence in the record to support the Findings of the trial court. This court has time and again stated that it will not retry the case on appeal but will limit itself to the question of whether there is substantial evidence supporting the trial court's Findings of Fact. Among such cases of this Court are the following:

Ruud v. American Packing and Provision Co., C. A. Idaho (1949) 177 F. 2d 238;

Fox v. Summit King Mines, C. C. A. Nev. (1944) 143 F. 2d 926;

Kaname Fujino v. Clark, C. A. Hawaii (1949) 172 F. 2d 384, certiorari denied 69 S. Ct. 1512, 337 U. S. 937, 93 L. Ed. 1743;

Ford v. United Fruit Co., C. A. Cal. (1948) 171 F. 2d 641.

The rule is given expression in Rule 52a of the Federal Rules of Civil Procedure (28 U. S. C. A., Rule 52). (See additional cases collected under Note 46 (thereof).)

Accordingly, the question upon this appeal is whether there is sufficient evidence to support the trial court's Findings that an oral contract was entered into by the parties and whether there is sufficient evidence that the words and conduct of defendant's principal officer were such as to create an equitable estoppel to assert the Statute of Frauds.

II.

The Evidence Establishes That a Valid and Binding Contract for the Sale and Purchase of Cattle Was Entered Into Between the Parties.

A. The Preliminary Conversation Between Mr. John Wade, President of Plaintiff Corporation, and Mr. Adolph Miller, President of Defendant Corporation.

In May or June, 1948 [Tr. 25], Mr. Wade, President of plaintiff, and Mr. Miller, President and General Manager of defendant, met in Los Angeles, at which time Mr. Wade advised Mr. Miller of the type of cattle his company was breeding, and that he believed that he would have approximately 1,000 head ready to market in August or September. They discussed the feasibility of shipping cattle from plaintiff's ranches in the interior of Canada to defendant's packing house in Los Angeles. Mr. Miller stated that he would be interested in purchasing plaintiff's type of cattle. The matter was left that Mr. Wade would get in touch with Mr. Miller when, in August or September, the cattle would be ready for market [Tr. 25, 34].

Accordingly, the evidence supports Finding IV [Tr. 9].

B. The Defendants Made an Offer to Purchase.

1. The Discussion Between Mr. Wade and Mr. Miller on September 8, 1948.

On September 8, 1948, Mr. Wade and Mr. Miller had a conference in Los Angeles. Mr. Wade told Mr. Miller that plaintiff had approximately 250 head of cattle ready for shipment [Tr. 37] and inquired if Mr. Miller was still interested in purchasing Canadian cattle [Tr. 26]. Mr. Miller replied that he was, and in answer to Mr. Wade's inquiry as to price, Mr. Miller said: "I will pay you 46¢ per pound, plus 2¢ for the offal, and grade from commercial up" [Tr. 26], which, in the nomenclature of the business, means 46¢ for each pound of beef dressed from said cattle and that no cattle would be graded below commercial grade [Tr. 26 and 27]. In the cattle breeding and meat packing businesses weight of offal means the difference between the weight of the dressed beef and the gross weight—offal being liver, heart, brains, sweetbreads, hides, intestines, etc. [Tr. 44].

2. The Discussion Between Mr. Wade and Mr. Miller on September 10, 1948.

On September 10, 1948, Mr. Wade contacted Mr. Miller and said to him: "Well, Adolph, let me understand you clearly. If we ship cattle to you here in Los Angeles you will pay us 46 cents, plus two cents for the offal, and this is a firm commitment," to which Mr. Miller replied: "Yes, I can use this type of cattle. *I will take them.*" Mr. Wade then said: "Well, the reason I am calling you back is I want to be sure that I have this commitment before I authorize the shipment of this cattle to Los Angeles," and Mr. Miller replied: "That is all right, son. *Send them on down,*" and then inquired how many there would be and

Mr. Wade replied: "Approximately 250 are ready to go now in this particular shipment, about 10 cars." Mr. Miller replied: "Well, that will be fine. You tell Swanson to send them on down." During this conversation Mr. Miller inquired when the cattle would be shipped and Mr. Wade answered, "We will ship before October first" [Tr. 45]. In this conversation, as well as the conversation of September 8, Mr. Miller stated that he wanted the cattle shipped to the Union Packing Co., at Los Angeles [Tr. 42], and it was understood that the cattle would be shipped by rail and would be killable fat cattle and not feeder cattle [Tr. 41].

That the trial court was amply justified in accepting plaintiff's evidence regarding the foregoing conversations, as well as the conversation of September 24-28, 1948, between Mr. Miller and Mr. Swanson, hereinafter referred to, is abundantly shown from the following questions of the Court to Mr. Miller and Mr. Miller's replies:

> "The Court: Are you active? Are you one of those executives that spend your time playing gin rummy or golf, or do you work at your job?
>
> The Witness: It all depends. Sometimes I am active.
>
> * * * * * * * *
>
> The Court: What I am getting at, *do you have so many of these conversations about cattle that it is hard for you to remember a particular conversation about this particular lot?*
>
> The Witness: *Yes, sir, I do.* I have various conversations with different people in different parts of the country." [Tr. 118].

Accordingly, Finding VI [Tr. 9] is abundantly supported by the evidence.

C. Thereafter, Between September 24 and 28, 1948, Defendant's President Reaffirmed the Offer.

Following his conversations with Mr. Miller on September 8 and September 10, Mr. Wade communicated the substance thereof to Mr. Jaffe [Tr. 47] and Mr. Swanson, who was at the ranch [Tr. 60], and 250 head of cattle were brought from the ranch to the railroad loading point at Williams Lake, British Colombia. *Mr. Miller admits that between September 24 and September 28, he talked with Mr. Swanson by telephone* [Tr. 114] *and that the subject of conversation was the sending of the cattle to the Union Packing Co. at Los Angeles* [Tr. 115]. Mr. Wade and Mr. Swanson testified that Mr. Swanson telephoned from Williams Lake to Mr. Miller in Los Angeles and that due to Mr. Swanson being somewhat hard of hearing, he held the telephone receiver away from his ear so that Mr. Jaffe could, and did, hear both ends of the conversation [Tr. 48]. Mr. Swanson advised Mr. Miller that he was shipping "his" cattle to him, and inquired how Mr. Miller wanted them consigned, and Mr. Miller instructed Mr. Swanson to send them down consigned to the Union Packing Co. *as he had a "deal"* [Tr. 49]. *Mr. Miller admits in answer to a question by the Court, that he did in this conversation instruct Mr. Swanson to send him the cattle* [Tr. 117].

Finding VIII [Tr. 10] is accordingly amply supported by the evidence.

D. Plaintiff Accepted Defendant's Offer.

It is undisputed that plaintiff shipped, consigned to defendant at Los Angeles, 10 carloads of cattle consisting of 248 head and that the cattle arrived in Los Angeles October 6, 1948, where they were unloaded the following

day. This shipment was made while the offer remained open and was commenced the evening of the day that Mr. Miller instructed Mr. Swanson to ship them to him stating he had an agreement respecting them. The delivery of these cattle in Los Angeles consigned to defendant constituted an acceptance of the offer and as a result a contract was created between the parties.

E. Additional Evidence of the Contract Between the Parties.

The night of the day upon which the last mentioned telephone conversation between Mr. Swanson and Mr. Miller occurred, Mr. Swanson had 248 head of cattle loaded at Williams Lake and the shipment was started to defendant in Los Angeles [Tr. 61].

Finding IX is accordingly supported by the evidence.

The cattle were unloaded at Vancouver for water and feed and while they were there Mr. Swanson, on September 28, 1948, telegraphed Mr. Miller: "TEN CARS LEAVING NOON TODAY FLYING DOWN SEE YOU TOMORROW" [Pltf. Ex. 1; Tr. 61]. The purpose of this wire was that Mr. Miller could accommodate the cattle upon arrival [Tr. 29]. Mr. Miller admits receiving this telegram [Tr. 83]. The foregoing evidence supports Finding X [Tr. 11].

1. THE INACTION OF MR. MILLER ON RECEIPT OF THE TELEGRAM ADVISING THAT THE CATTLE WERE LEAVING, IS EVIDENCE OF THE EXISTENCE OF A CONTRACT BETWEEN THE PARTIES.

Mr. Miller testified that upon receipt of the telegram telling him that the cattle were leaving, he unsuccessfully attempted to reach Mr. Swanson by telephone at the Vancouver stockyards [Tr. 83]; but that *his only purpose of*

trying to reach Mr. Swanson was to advise him the conditions of the Los Angeles market [Tr. 114], and although when he got the wire ". . . I figured he probably was shipping them to me." [Tr. 117.]

As Mr. Miller's company only buys cattle for the purpose of slaughtering and packing and not for resale or as a broker [Tr. 79], his admision that he believed the cattle were coming to him is clear evidence that he believed there was an agreement respecting the purchase of the cattle. Otherwise, Mr. Miller would have made efforts to contact Mr. Swanson at one of the hotels in Vancouver, or some official of defendant at the ranch, or attempted to locate Mr. Swanson through his home in the Los Angeles area the location of which he must have known having known Swanson for twenty years [Tr. 79]. None of these efforts were made by Mr. Miller [Tr. 83]. All that he did was to perfunctorily try to reach Swanson by telephone at the Vancouver stockyards and was, of course, unsuccessful.

2. The Consigning of the Cattle by Plaintiff to Defendant Is, in View of the Established Custom of the Business, Evidence of the Existence of an Agreement.

The evidence is undisputed that by custom in the business cattle are consigned to the buyer only when an agreement for their purchase exists, and that if the shipper sends cattle intending to sell them on the open market, he consigns them to himself at their destination [Tr. 32]. The evidence is also undisputed that these cattle were consigned to the defendant in Los Angeles, not to the plaintiff [Tr. 84].

3. The Actions of Mr. Miller Upon the Arrival of the Cattle in Los Angeles Is Strong Evidence of the Existence of an Agreement.

When Mr. Swanson first saw Mr. Miller after his arrival in Los Angeles, and while the cattle were in transit, Mr. Miller repudiated his agreement but, nevertheless, at that time he (1) admits that he diverted the cattle to the Union Stockyards [Tr. 84], which was not requested by Mr. Swanson [Tr. 76]; and (2) arranged that Mr. Hill, of the Southwest Commission Company, procure bids for the cattle [Tr. 66]. The terms under which this commission house was to handle the cattle were not discussed with Mr. Swanson [Tr. 77]. When Mr. Hill advised Mr. Miller that the highest bid from any of the packers was that of the Cudahy Company of 21¢ per lb. live weight, Mr. Miller, on behalf of defendant, then paid the commission house 21-½¢ per lb. live weight, had the cattle delivered to his packing house and slaughtered [Tr. 67, 69, 86]. *The fact that defendant thus paid for these cattle $1,348.10 more than the highest bid of all other packers is strongly persuasive that Mr. Miller knew that he had an agreement for their purchase* and was thereby merely endeavoring to make his breach of the agreement less flagrant.

It is no answer to the fact that Mr. Miller paid $1,348.-10 more than the market for these cattle to say, as defendant does, that it was out of friendship for Mr. Swanson. Mr. Miller's deal for the cattle was set between himself and Mr. Wade, and Mr. Miller knew that he was dealing with a corporation and he did not know what interest, if any, Mr. Swanson had in the seller corporation [Tr. 87].

The trial court, believing Mr. Miller's conduct upon the arrival of the cattle to be only explainable upon the basis that Mr. Miller knew that he had an agreement for their purchase, observed:

> "Had these men just shipped cattle to him without any understanding on his part that they were coming down, what would the ordinary man have done? If I were Mr. Miller and I was in business and the plaintiff corporation purported to ship me ten carloads of cattle that I had no contract with and hadn't ordered, I probably would have 'blown my top' . . . I probably would have said, 'What is going on here? You fellows are shipping me cattle that I didn't order,' and then you find him proceeding to assist in arranging for the sale elsewhere." [Tr. 120.]

4. The Defendant Corporation's Records Show the Existence of an Agreement.

The Court's attention is directed to Plaintiff's Exhibits 2A to D, inclusive, being the records of defendant's slaughtering operations of these and other cattle from October 12 to October 15, 1948, inclusive, and to Plaintiff's Exhibit 2E being taken from Exhibits 2A to D, inclusive, and showing the record only so far as the slaughter of the cattle in question is concerned. The cattle in question are entered as Lots 37, 39, 43, 54 and 60. It will be noted that the records are that Lot 39, consisting of 63 head, Lot 43, consisting of 60 head, Lot 54, consisting of 60 head, and Lot 60, consisting of 59 head, *each had the identical percentage of dressed weight to live weight, viz: 50.02%* This would mean that four separate lots of 63 head, 60 head, 60 head and 59 head, the cattle being taken at random to make up such lots, all dressed with the identical percentage of dressed weight to live weight! This

is preposterous. If the Court will look at Exhibits 2A to D, inclusive, under the column "yield", it will see that no two of the percentages of yield of dressed weight to live weight of any of the other lots are the same, except the lots comprising plaintiff's cattle.

It must, of necessity, be inferred, therefore, that these cattle were considered by the defendant (and its records were kept) on quite a different basis than that of any other cattle slaughtered at this time. The only explanation of this is that the defendant, knowing of its agreement to pay 46¢ a lb. for beef dressed from the cattle, and 2¢ a lb. for offal, kept its records with this obligation in mind.

F. No Action of Plaintiff Was Inconsistent With the Existence of an Agreement With Defendant.

Defendant endeavors in its brief, as it did at the trial, to make some point of the fact that Mr. Swanson showed these cattle to buyers at Williams Lake and Vancouver. This has no significance whatsoever in view of the fact that the *agreement was not for any particular cattle* but was merely for any approximate 250 head of killable fat cattle. Plaintiff could have shipped any cattle meeting these specifications. It is undisputed that plaintiff had at their ranches a herd of some 4,500 head, and had 500 to 600 head ready for market in September of 1948 [Tr. 47]. Plaintiff could have complied with the offer by shipping any killable fat cattle of an approximate number of 250 head.

Nor was any action of Mr. Swanson after he arrived in Los Angeles inconsistent with the existence then of the agreement. The cattle were unloaded at the Union Stockyards in the afternoon of Thursday, October 7 [Tr. 106]

and the time limit within which they had to be slaughtered expired on Tuesday, October 12 [Tr. 105]. It is customary after a long trip, to give cattle several days rest. The Union Stockyards, from which the Southwest Commission Company operates, is the only outlet for cattle in Los Angeles [Tr. 78]. These Stockyards did not operate on Saturday, October 9, or Sunday, October 10, and Tuesday, October 12, being a legal holiday, they were closed [Tr. 108]. Mr. Swanson was, in view of Mr. Miller's repudiation as he said, "in a spot." [Tr. 68.] The cattle had to be slaughtered by Monday, October 11, under the Department Regulations. He acompanied Mr. Miller to see Mr. Hill of the Southwest Commission Company only *after* Mr. Miller had repudiated [Tr. 69 and 70]. He did not authorize the diversion nor did he employ the Southwest Commission Company [Tr. 77]. Knowing of the agreement respecting the cattle and that as they had been delivered they were now defendant's property, it was not for him to object either to Mr. Miller diverting them or placing them in the hands of Mr. Hill for sale. All of his actions were entirely consistent with the existence of the agreement in question. Mr. Hill was able to procure from the Department in Washington an extension of the time under the regulations to Friday, October 15 [Tr. 107], but this was subsequent to the aforementioned acts of Mr. Miller and, as the cattle were sold to Mr. Miller on Monday, October 11 [Tr. 107], the extension was of no consequence.

Accordingly, defendant having made a continuing offer to purchase from plaintiff for a stated price approximately 250 head of cattle to be delivered to it in Los Angeles and plaintiff having accepted such offer by so delivering 248 head, there was an agreement between the parties.

III.

The Terms of the Agreement Were Definite and Certain and Were Fully Performed by Plaintiff.

Point I-c, page 15, *et seq.*, of Appellant's Opening Brief consists of the bare statement that the agreement is not enforceable as the terms are "indefinite and uncertain." No specification whatever is given as to how or in what manner the terms were either indefinite or uncertain. On the contrary, the terms of the agreement were definite and certain and plaintiff performed all of its undertakings thereunder.

A. The Agreement Was Definite and Certain as to Subject Matter.

The subject matter of the agreement discussed by Mr. Wade and Mr. Miller on September 8 and September 10, was approximately 250 head of killable fat cattle [Tr. 37, 41, 45]. 248 head of killable fat cattle were consigned by plaintiff to defendant and would have been delivered to defendant had defendant not, itself, diverted the cattle elsewhere [Tr. 33].

B. The Price to Be Paid for the Cattle Was Definite and Certain.

In both conversations of September 8 and of September 10, Mr. Miller agreed on behalf of the defendant to pay a minimum price of 46¢ per pound of beef dressed from said cattle, plus 2¢ per pound of offal yielded by said cattle, and judgment herein was rendered upon this basis.

C. The Time for the Delivery of the Cattle in Los Angeles Was Agreed to.

It was understood that the cattle would be shipped by rail [Tr. 41], that they would be ready for shipment from plaintiff's ranches before October 1, 1948 [Tr. 38 and 45], that they would be shipped to defendant in Los Angeles [Tr. 42], and that they would require about 10 days in transit [Tr. 38]. Hence, delivery in Los Angeles was to be made any time before October 10.

Plaintiff shipped the cattle by rail, routing them by the fastest and best manner available [Tr. 46 and 47] and the cattle arrived in Los Angeles on October 6 [Tr. 33]. The place of delivery was definite and certain, it being understood by both Mr. Miller and Mr. Wade, from their conversations of September 8 and September 10, that the cattle would be delivered to the yards of the Union Packing Co. in Los Angeles and Mr. Miller so instructed Mr. Swanson in his conversation with him September 24-28 [Tr. 49].

Plaintiff, pursuant to the agreement, consigned the cattle to the Union Packing Co. yards in Los Angeles [Tr. 84] and they would have been so delivered on October 6, had defendant not caused them to be diverted elsewhere.

IV.

Defendant Repudiated the Contract Because of the Admitted Drop in the Market for Dressed Beef and Because of the Admitted Cancellation by the Government of Substantial Contracts for the Purchase of Dressed Beef.

A. Defendant Repudiated the Contract Because of the Drop in the Market Price of Dressed Beef From September 8th and 9th Levels to the October 1st—4th Levels.

Plaintiff's Exhibits 14 and 15, being the Federal-State Market News Service of the United States Department of Agriculture, show that on September 10, 1948, the market of sales of commercial grade dressed beef from packers to retailers was $48 to $50 per 100 lbs. for cattle weighing between 350 and 600 lbs., and $46 to $48 for cattle weighing between 600 lbs. and 700 lbs. Whereas, on October 7, 1948, the market price had dropped to $43 to $46 per 100 lbs. for cattle weighing between 350 and 600 lbs., and to $40 to $43 per 100 lbs. for cattle weighing between 600 and 700 lbs.

Mr. Miller testified that his company operated on a 1-½% net profit [Tr. 116]. Accordingly, on September 8 and 10, when his mean selling price as seen above was $48 per hundred lbs. of dressed beef, he could purchase the cattle from defendants at the contract price of $46 per 100 lbs. of dressed beef and net a substantial profit. On the other hand, on October 7, when the mean selling price of dressed beef was as seen above $43 per 100 lbs. of dressed beef, he would lose money by taking the beef at

the contract price of $46 per 100 lbs. Not only would he then be selling for less than his purchase price, but he would also have his expenses in connection with slaughter, packing, etc.

Nor is the situation from defendant's standpoint any different if the period of October 1st to October 4th is taken, for as seen from Plaintiff's Exhibits 14 and 15, the market price of dressed beef for this period was $46 to $49 per 100 lbs. for cattle weighing 350 to 600 lbs., and $45 to $46 for cattle weighing 600 to 700 lbs.

Not only did the market drop between September 8-10th and October 1st to 7th, as above stated, but Mr. Miller admits that the market dropped between the conversation on September 24-28 with Mr. Swanson (when Mr. Miller told Mr. Swanson to send the cattle down to him as he had a deal) and the arrival of the cattle in Los Angeles [Tr. 97].

It was entirely true, as Mr. Miller testified: " . . . I knew if I would have received those cattle at our plant, slaughtered them and paid them their value, I would be the fall guy." [Tr. 87].

B. Defendant Repudiated the Contract Also Because of the Cancellation of Government Contracts.

When, on September 8 and 10 Mr. Miller agreed to buy the cattle at the stated price, and also on September 24-28 when he told Mr. Swanson to send them down as he had a deal, defendant had five contracts with the United States Government to supply it with an aggregate of 200,000 lbs.

of dressed beef [Pltf. Ex. 13]. Apparently, while the cattle were in transit, these contracts were cancelled by the Government, effective October 4, 1948 [Pltf. Ex. 13]. Accordingly, defendant needed cattle for 200,000 lbs. of dressed beef less than was needed to fill its requirements prior to the cancellation of these Government contracts. This diminution of defendant's need was attempted to be met by repudiating the agreemment with the plaintiffs, whose cattle produced 148,015 lbs. of dressed beef [Tr. 52].

Appellant attempts to answer this by stating that these Canadian cattle could not have been used to fulfill the Government contracts. There is, however, not a scintilla of evidence in the record to support this contention. The claim is further without merit because it is the defendant's total needs to fill all of its requirements that is the proper consideration rather than cattle from any particular source to fulfill the requirement of any particular contracts.

The trial court justifiably attached significance to the foregoing explanation "of why Mr. Miller changed and contended he had no deal," for it observed:

> ". . . the physical facts of the market are shown by Exhibits 14 and 15, and are most significant in that apparently during the month of September the market was up pretty far, 47¢, 48¢, 50¢. Mr. Miller has testified that their profit on turnover was a very minor one of 1% or more on the turnover. It was observed, therefore, that with the market in that shape he could have taken this meat, turned it over and made

money. . . . But the market drops and it would not have been possible to turn the meat over." [Tr. 125.]

Referring to the cancellation of the Government contracts, the Court says:

"The Army contracts total some 200,000 pounds of meat. As long as those contracts continued, whereby the defendant could process meat and sell it for some 60¢, he could well have afforded, regardless of what happened to the market, to have bought this meat at 46¢ and not necessarily used this meat to fulfill the contract, but lots of meat was being handled and it just meant that there was 146,000 pounds of meat available for his needs. But the minute those contracts were cancelled, and the record does not show that he knew beforehand that they were going to be cancelled, but the practical matter is that somewhere before the 4th of October probably he had some notice of it, certainly he did on October 4, that he was not going to need as much meat as he had needed before. . . . He was not in a position to take 46¢ meat and turn it over at a profit as he could under the Army contracts." [Tr. 124.]

"I attach significance to those two facts, not dependent upon human testimony, as being the possible explanation of why Mr. Miller's attitude changed and he contended he had no deal." [Tr. 125.]

V.

Defendant, by the Words and Conduct of Its President and General Manager, Is Estopped to Assert the Statute of Frauds.

Sections 1624A and 1724 of the Civil Code of California, and Section 1973A of the Code of Civil Procedure of California, as amended in 1931, provide:

> "A contract to sell or a sale of any goods . . . of the value of $500 or upward shall not be enforceable by action unless the buyer shall accept part of the goods . . . and actually receives the same, or gives something . . . in part payment . . ."
>
> "*There is an acceptance of goods within the meaning of this section when the buyer,* either *before* or after *delivery* of the goods, *expresses by words or conduct his assent to becoming the owner of those specific goods.*" (Emphasis ours.)

The trial court found that the defendant is estopped to assert the Statute of Frauds [Conclusions of Law III, Tr. 19; and Findings VIII to XVI, inclusive, Tr. 10, *et seq.*].

This Court has held that it will not interfere in the determination by the trial court of the application of equitable estoppel in the absence of an abuse of discretion. In the case of *Schnick Service v. Jones* (1949), C. C. A. 9, 173 F. 2d 969; *certiorari* denied 70 S. Ct. 62, 338 U. S. 819, 94 L. Ed. ...., the Court at page 977 said:

> "It has also been held by the California courts that *a trial court has considerable discretion in determining the application of equitable estoppel, and an Appellate Court should not interfere in the absence of abuse of discretion. Flint v. Giguiere,* 50 C. A. 314, 195 Pac. 85." (Emphasis ours.)

A. Defendant Is Estopped to Assert the Statute of Frauds by Reason of the Facts That Its President and General Manager, Between September 24th and 28th, and Before the Cattle Were Shipped, Acknowleged the Agreement and Directed Plaintiff to Ship the Cattle to the Defendant.

Mr. Miller admits that following the making of his offer, he had a telephone conversation with Mr. Swanson, the subject of which was the sending of the cattle to defendant at Los Angeles [Tr. 115]. This occurred between September 24th and 28th. Mr. Wade and Mr. Swanson both testified that during this conversation Mr. Miller told Mr. Swanson to send the cattle down, as he had a deal [Tr. 49]. *Mr. Miller himself admits that in this conversation he instructed Mr. Swanson to send him the cattle* [Tr. 117].

This constituted an acceptance of the cattle by Mr. Miller under Section 1624A and 1724 of the California Civil Code, and Section 1973A of the California Code of Civil Procedure, inasmuch as thereby "the buyer . . . before . . . delivery of the goods expresses by words . . . his assent to becoming the owner . . ."

The facts of *Platt v. Union Packing Co.* (1939), 32 Cal. App. 2d 329, 89 P. 2d 662, are identical with those of the principal case, even to the extent of the same party defendant and Mr. Miller as the principal witness. In that case, also, Mr. Miller offered to purchase cattle at a stated price and before delivery the market dropped (as in this case), and, as here, Mr. Miller attempted to repudiate his contract and relieve himself of his obligations by asserting the Statute of Frauds.

In holding that defendant's action in advising plaintiff after the continuing offer was made "that defendant

wanted and would take the steers" estopped defendant from asserting the Statute of Frauds, the Court at page 333 said:

> "The Arizona statute of frauds (Sec. 2808, Rev. Code of Arizona) is similar to our own (sec. 1734, Civ. Code; sec. 1973a, Code Civ. Proc.), and thereunder *any act of the vendee manifesting an intention on his part to accept the chattels or some part thereof places the transaction without the pale of the statute of frauds,* and a selection of portions of the vended property may be evidence of an acceptance." (Emphasis ours.)

In *Rutland, Edwards & Co. v. Cooke* (1941), 44 Cal. App. 2d 258, 112 P. 2d 287, defendant instructed his stockbrokers to purchase for his account certain stocks, and after the purchase refused to pay therefor and set up the Statute of Frauds as a defense. The Court held that defendant was estopped to assert the Statute of Frauds inasmuch as, after being informed of the purchase and that the value had risen, the defendant replied that the profit was not big enough. The Court at page 263 said:

> "This alone is sufficient to bring the case within the exception of Sec. 1624A of the Civil Code as an expression of 'by words or conduct is assent to becoming the owner of those specific goods.'"

B. Defendant Is Estopped to Assert the Statute of Frauds by Having Induced Plaintiff to Make Large Expenditures in the Performance of the Agreement.

Following the September 24-28 conversation, in which Mr. Miller told Mr. Swanson to send the cattle down as he had a deal, and in reliance upon the agreement, defendant expended to fulfill that agreement the sum of $6,327.12 in freight charges to transport the cattle to Los Angeles

[Pltf. Ex. 7], together with the sum of $3,822.00 for United States Customs duties [Pltf. Ex. 8], or a total sum of $10,149.12. The expenditure of these sums is undisputed.

It is well settled that one who induces another by words or conduct to expend money or to part with value in reliance that the agreement will be carried out, is estopped to assert the Statute of Frauds.

> "The appellants by their language and conduct led the respondent to make expenditures in the purchase of the shares of stock upon the supposition that the contract was to be carried into execution and for that reason they are estopped to deny the contract." *Rutland, Edwards & Co. v. Cooke* (1941), 44 Cal. App. 2d 258, at 263, 112 P. 2d 287.

> "But be that as it may, under the circumstances of the case, as we are required to view it, appellant is estopped from urging the statute of frauds. Flint performed his part of the agreement. He surrendered his property right upon the faith of Giguiere's promise to pay one dollar per head. Having received the benefit of that agreement with Flint, it would be unjust and inequitable for defendant to repudiate it upon the ground that the contract was not in writing. Many refinements and much learning on the subject are displayed in the books and the decisions, but we think it can be safely said that in cases like this where one of the parties has performed his obligation, has suffered the detriment contemplated by the agreement, and the other party has fully received the benefit of the transaction, the chancellor has a large discretion in determining whether it would be inequitable to allow the party who gains by the contract to take refuge under the statute of frauds, and unless it can be said that such discretion has been abused, an ap-

pellate court will not interfere." *Flint v. Giguiere* (1920), 50 Cal. App. 314, at 320, 195 Pac. 85. (Quoted with approval in *Tobola v. Wholey* (1946), 74 Cal. App. 2d 351, at 357, 170 P. 2d 952.)

C. Defendant Is Estopped to Assert the Statute of Frauds by Reason of Having Failed to Communicate With Plaintiff Upon Receipt of the Telegram Advising Him That the Cattle Were Being Shipped.

Prior to plaintiff incurring the $10,000 expense referred to above, and prior to plaintiff incurring the hazard to its cattle, referred to below, plaintiff's officer advised defendant's President by telegram that the cattle were being shipped to him from Vancouver, B. C. [Pltf. Ex. 1]. Mr. Miller recklessly disregarded plaintiff's interests in not making proper efforts to contact plaintiff if he did not intend to accept the cattle upon arrival. Mr. Miller testified that his *only* effort on receipt of the telegram was placing a telephone call to Mr. Swanson at the Vancouver stockyards [Tr. 83] and that he made no effort to reach Mr. Swanson at any hotel in Vancouver, nor did he try to locate Mr. Swanson through his home in the Pasadena area (although he must have known where Mr. Swanson lived, having known him for some twenty years) [Tr. 79], nor did he make any effort to contact anyone at the plaintiff's ranches, nor did he attempt to reach Mr. Wade at his office in Los Angeles nor Mr. Jaffe at either his Los Angeles office or his residence in Beverly Hills. However, it was not for the purpose of telling Mr. Swanson not to send the cattle that he made the single effort to reach him at the Vancouver stockyards, *but it was only, as Mr. Miller himself testified, in order to advise Mr. Swanson of the market conditions in Los Angeles* [Tr. 114].

In *Fidelity Surety Co. v. Millspaugh and Irish Corp.* (1926), C. C. A. 7, 14 F. 2d 937, at page 939, the Appellate Court concluded that "The knowledge and active participation of the (surety) company . . . as well as the acts of its general agent . . . indicate not only its consent, but its desire that the obligations should be renewed. . . ." and, accordingly, the Circuit Court sustained the trial court and affirmed its judgment that the defendant was estopped to assert the Statute of Frauds. *"The knowledge it thus had of what was being done, together with its participation therein and consent thereto, estop it from raising any such question" viz., the Statute of Frauds.* (Emphasis ours.)

D. Defendant Is Estopped to Assert the Statute of Frauds by Reason of the Conduct of Its President in Inducing the Plaintiff to Bring the Cattle Into the United States, Well Knowing That They Would Have to Be Slaughtered Within Approximately Four Days After Arrival at Los Angeles and so Depriving Plaintiff of a Reasonable Opportunity to Procure a Proper Price Therefor.

The Regulations of the United States Department of Agriculture required that these Canadian cattle be slaughtered within fourteen days after they entered the United States [Tr. 107], a circumstance which Mr. Miller knew [Tr. 85]. The cattle entered the United States on September 29, were unloaded in Los Angeles Thursday, October 7 [Tr. 106] and the time limit within which they had to be slaughtered expired Tuesday, October 12 [Tr. 105]. Saturday, October 9, Sunday, October 10, and Tuesday, October 12, were holidays and the Union Stockyards, the only place in Los Angeles where the cattle could be disposed of [Tr. 78], were closed on those days. Further-

more, it is customary after a long trip to water and feed cattle for a few days after their arrival in order to procure a proper price. Mr. Miller had been told previously by Mr. Wade that the cattle would be in transit approximately ten days [Tr. 38] and, therefore, knew that defendant would have only a bare four days within which to dispose of the cattle upon the market. Accordingly, by inducing the plaintiff to bring the cattle to Los Angeles he deprived plaintiff of any opportunity to properly market them.

One who induces another to change his position to his detriment upon the supposition that a contract will be fulfilled, is estopped to assert the Statute of Frauds.

> ". . . As said in *Wilson v. Bailey, supra,* page 423: 'It is a general equitable principle, a part of the broader equitable doctrine stated in *Dickerson v. Colgrove,* 100 U. S. 578, 580 [25 L. Ed. 618] and quoted therefrom in *Carpy v. Dowdell,* 115 Cal. 677, 687 [47 P. 695], as follows: *"The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both."'* [Emphasis ours.]
>
> "Where a party, in reliance on a parol contract that should have been reduced to writing, has changed his position or parted with value so that it would be an injustice to permit the other party to rely on the statute of frauds, the doctrine of equitable estoppel will be invoked and the statute of frauds is not available to perpetuate the fraud. (*Grant v. Long,* 33 Cal. App. 2d 725, 740 [92 P. 2d 940] . . .)"

"Had it not been for Bisno's promise, plaintiff no doubt could have arranged with the owner to receive the entire amount of Bisno's offer and to pay plaintiff therefrom a commission of $2,500. The finding, supported by the evidence, that Bisno orally agreed to pay the $2,500; that in reliance thereon plaintiff irremediably changed his position to his detriment by releasing the owners of the property from any obligation to pay him a commission is sufficient to support the court's conclusion that the statute of frauds was not available to Bisno. (*Columbia Pictures Corp. v. De Toth*, 26 Cal. 2d 753, 759 [161 P. 2d 217, 162 A. L. R. 747]; *Halsey v. Robinson*, 19 Cal. 2d 476, 481 [122 P. 2d 11]; *Vierra v. Pereira*, 12 Cal. 2d 629 [86 P. 2d 816]; *Wilson v. Bailey*, 8 Cal. 2d 416 [65 P. 2d 770].)"

LeBlond v. Wolfe, 83 Cal. App. 2d 282, at pp. 286, 287, 188 P. 2d 278.

In *Seymour v. Oelrichs* (1909), 156 Cal. 782, 794, 106 Pac. 88 (referred to in *Notten v. Mensing* (1935), 3 Cal. 2d 469, 474, 45 P. 2d 198, as "the leading case in this State"), the scope and application of the doctrine of equitable estoppel is set forth in the following language:

"The right of courts of equity to hold a person estopped to assert the statute of frauds, where such assertion would amount to practicing a fraud, cannot be disputed. It is based upon the principle 'thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud or in the consummation of a fraudulent scheme.' (2 Pom-

> eroy's Equity Jurisprudence, sec. 921.) It was said in *Glass v. Hulbert,* 102 Mass. 24, 35, [3 Am. Rep. 418]: 'The fraud most commonly treated as taking an agreement out of the statute of frauds is that which consists in setting up the statute against its enforcement, after the other party has been induced to make expenditures, or a change of situation in regard to the subject-matter of the agreement, or upon the supposition that it was to be carried into execution, and the assumption of rights thereby to be acquired; so that the refusal to complete the execution of the agreement is not merely a denial of rights which it was intended to confer, but the infliction of an unjust and unconscientious injury and loss. In such case, the party is held by force of his acts or silent acquiescence, which have misled the other to his harm, to be estopped from setting up the statute of frauds.' This state has been accepted as setting forth a plain and satisfactory ground for equitable jurisdiction, together with a clear indication of the proper limitation of its exercise. . . ."

In the *Seymour* case the plaintiff was induced to change his situation by giving up a position with the Police Department in reliance upon the "words and conduct" of the defendant that he would be given other employment. The Court held the party making such inducement to be estopped from asserting the Statute of Frauds. Similarly, in the principal case plaintiff was induced by defendant's President to change its situation by bringing its cattle to Los Angeles where they had to be slaughtered within four days after arrival, which plaintiff did in reliance upon words and conduct of defendant's President that it would pay the agreed price therefor. In both cases the words and conduct of the defendant made it impossible for the

plaintiff to be placed in *status quo*. Consequently the doctrine of equitable estoppel is equally applicable in both cases.

E. All of the Cases of This Court Cited by Defendant Recognize the Doctrine of Equitable Estoppel.

Defendant appears to get great comfort from the case of *E. K. Wood Lumber Co. v. Moore Mill & Lumber Co.* (1938), C. C. A. 9, 97 F. 2d 402. Here defendant through its agent made a written offer to sell plaintiff lumber at a stated price. Thereafter defendant notified its agent that the offer was unacceptable and to "clear his skirts" of it. Subsequently plaintiff advised defendant it accepted the offer. Upon defendant's refusal to deliver, plaintiff purchased lumber in the open market and brought suit. Defendant interposed the defense of the Statute of Frauds upon the ground that its agent had no written authority to make the offer. *The holding of the case is simply that no facts were shown to estop the defendant from asserting the Statute of Frauds.*

However, this Court fully recognized the application of the doctrine of equitable estoppel when there are sufficient facts upon which to do so. *Immediately following the portion quoted by counsel* on page 21 of the Appellant's Brief, this Court continued:

> "In this case there is no evidence from which it could be inferred that appellee represented either that its agent had written authority or that it would not avail itself of the defense of the statute. * * * Appellee could in no way be estopped to assert the defense of California Civil Code, sec. 2309, *unless it represented that its agent was authorized to enter into contracts required to be in writing.*" (Page 409.) (Emphasis ours.)

At page 20 of Appellant's Opening Brief counsel quotes a portion of the trial court's comment in connection with this case; but counsel did not continue to read the above quoted portion of this decision, nor does he quote it to this Court.

In the *Wood Lumber Co.* case the Court fully recognized the doctrine of equitable estoppel to assert the Statute of Frauds but merely held that the facts therein presented did not warrant its application.

Counsel also cites *Georgia Peanut Co. v. Famo Products Co.* (1938), C. C. A. 9, 96 F. 2d 440. Again this Court held therein that there were no facts to justify the application of the doctrine of equitable estoppel. However, there can be no doubt that the Court recognized that the doctrine does apply when the facts warrant; for at page 441 this Court said:

> "Since there is no binding contract, *the buyer can be estopped to deny its validity only by some prejudice to the seller caused by some affirmative act on which the seller relied.* We uphold the District Court's finding that there was no such action on the part of the buyer." (Emphasis ours.)

Also, relied upon by defendant is *Cincinnati Distributing Co. v. Sherwood & Sherwood Co.,* C. C. A. 9, 270 Fed. 82. Here again this Court recognized the doctrine of equittable estoppel to assert the Statute of Frauds in the following language found at page 83, *et seq.:*

> "It is true that a contract may be within the Statute of Frauds, *yet if the conduct of the party who relies upon* the statute has been such as to raise an equity outside of and independent of the contract, he may be estopped to make that defense. 20 Cyc. 308." (Emphasis ours.)

VI.

The Findings Support the Judgment.

In Point III of Appellant's Opening Brief (p. 31) and to support its erroneous contention that the Findings are irreconcilable with the existence of a contract, appellant says Finding V [Tr. 9] declares that the conversation of September 8 created an oral contract. Finding V does not so state. It further says that Finding VI [Tr. 9] states that the telephone conversation of September 10 confirmed this oral contract. Finding VI does not so state. These contentions are simply due to a misreading of Findings V and VI. Finding V and Finding VI are findings directed to the making of the offer and the confirmation thereof. The oral contract came into being when plaintiff accepted this offer as found in Finding IX [Tr. 11], and thereupon the Court concludes, in Conclusions of Law III [Tr. 19] that a contract resulted from such offer and acceptance.

Under Point III of Appellant's Brief (p. 31 *et seq.*), appellant also contends that the recovery should have been for damages under Section 1784 of the Civil Code of California, rather than for the balance of the unpaid purchase price. However, Civil Code, Section 1784, was held not applicable to a situation where the buyer repudiated a contract providing for the payment of the purchase price at a time certain (as in the principal case upon delivery of the cattle), but rather the California Code, Section 3302, governs, in *Union Liquors, Inc. v. Finkle & Lasarow, Inc.* (1941), 44 Cal. App. 2d 706, 113 P. 2d 19.

Civil Code, Section 3302, provides: "*Breach of contract to pay liquidated sum.* The detriment caused by the breach of an obligation to pay money only is deemed to be the amount due by the terms of the obligation, with in-

terest thereon." In an action to recover a sum of money where the consideration has passed to the obligor, Civil Code, Section 3302, was held to apply in *Williams v. Marshall* (1921), 54 Cal. App. 24, 200 Pac. 1058, and *Nielson v. Swanburg* (1929), 99 Cal. App. 270, 278 Pac. 876.

The title to these cattle having passed to the buyer (whether buyer accepted possession thereof or not) by reason of seller having complied with the terms of the agreement in delivering the cattle, California Civil Code, Section 1783(1), would also apply with the same result as Section 3302, viz., plaintiff is entitled to "the amount due under the terms of the obligation." Civil Code, Section 1783(1), provides:

> "*Action for the price.* (1) Where, under a contract to sell or a sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract or the sale, the seller may maintain an action against him for the price of the goods."

And, in *Johnson v. Besoyan* (1948), 85 Cal. App. 2d 389, 183 P. 2d 63, the Court held that the action by a seller against a buyer who neglects to pay for goods when title has passed, is on the contract and not for damages for breach thereof, and that the measure of damages is under Civil Code, Section 1783, for the agreed price under the contract.

Accordingly, the amounts recoverable herein is not damages under Civil Code, Section 1784, but is, as applied by the trial court, the sum due under the contract, pursuant to Civil Code, Sections 3302 and 1783(1).

However, the question is merely academic. If as defendant contends the measure of recovery is the difference

between the contract price and the current price (Civil Code, Sec. 1784) the sum to which plaintiff is entitled is the same. The "current price" would be the sum paid for the cattle, viz.: 21½ cents per pound. This sum plus the expenses of the Southwest Commission Company subtracted from the contract price results in the same figure as the judgment rendered.

Conclusion.

The decision of the trial court that there was an agreement between the parties arising from the defendant's offer and the plaintiff's acceptance thereof and that the defendant by the words and conduct of its principal officer is estopped to assert the invalidity of that agreement by reason of the Statute of Frauds is abundantly supported by substantial evidence. Therefore, this Court should affirm the Judgment.

Respectfully submitted,

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